STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2003
v	No. 229661 Wayne Circuit Court
DAMON L. SMITH, Defendant-Appellant.	LC No. 99-010166

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion when it denied his request for substitute counsel on the day of trial. We disagree.

An indigent person entitled to appointed counsel is not entitled to counsel of his choice, nor is he entitled to different counsel whenever and for whatever reason dissatisfaction arises with the counsel provided for him. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *Mack, supra* at 14. Good cause exists where a defendant can demonstrate a complete breakdown of the attorney-client relationship or if a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* A court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *Id.*

In this case, defendant argues that substitute counsel should have been appointed because trial counsel inexplicably withdrew defendant's alibi defense on the day of trial. However, defendant did not refer to this issue below as a basis for his request for substitute counsel. At trial, counsel stated that both he and defendant had decided to withdraw the alibi notice after an

unsuccessful attempt to diligently pursue the defense. Both defendant and counsel jointly signed the notice of withdrawal of this defense. Thus, the record does not support defendant's claim that a difference of opinion existed regarding the withdrawal of the alibi notice.

Defendant also asserts that counsel inexplicably moved for a psychological evaluation through the forensic center, thereby demonstrating that there was a fundamental breakdown in the attorney-client relationship. At trial, counsel explained that the request was based on last minute statements from defendant's mother and sister that defendant had been acting erratically since he and his girlfriend ended their relationship, resulting in heavy daily alcohol use by defendant. Defendant did not object to this characterization, rather immediately moved for substitute counsel after the court denied defense counsel's motion. Under these circumstances, we are not persuaded that there was a difference of opinion over a fundamental trial strategy.

Defendant makes a related claim that counsel was "unprepared" to put forth a defense of intoxication, but fails to discuss this claim with any degree of specificity. A defendant may not simply assert a position and then leave it to this Court to search for a factual or legal basis to sustain or reject his position. *Mudge v Macomb Co*, 458 Mich 98, 105; 580 NW2d 845 (1998). Defendant complained at trial that counsel did not come to see him about his case until "the other week." That lone assertion is insufficient to demonstrate a breakdown in the attorney-client relationship or an irreconcilable difference in a fundamental trial tactic. We conclude that the trial court did not abuse its discretion in determining that defendant failed to demonstrate "good cause" to warrant the appointment of substitute counsel. *Mack, supra* at 14.

II

Defendant next argues that reversal is required because of instructional errors. Again, we disagree. This Court reviews jury instructions in their entirety, rather than piecemeal, to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id*.

Defendant first argues that the trial court erred in refusing to provide a requested instruction on diminished capacity, based upon his alleged intoxication at the time of the shooting. We find that the evidence at trial did not support a defense based on intoxication.[1] Defendant consistently claimed, even after withdrawing his formal alibi defense, that he did not shoot the complainant and was not present when the shooting occurred. Moreover, the trial court specifically instructed the jury that, in order to find defendant guilty of first-degree murder, it must find that he had the specific intent to kill the decedent and that he did so deliberately after considering "the pros and cons of killing" and engaging in "substantial reflection." Thus, the substance of the omitted instruction was sufficiently covered by the instructions the court did

[1] We recognize that a diminished capacity defense is no longer viable in light of our Supreme Court's decision in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), and that CJI2d 6.3 has since been deleted from the standard jury instructions. However, the defense was viable at the time of defendant's trial in April 2000.

give and appellate relief is not warranted. *Id*. Consequently, we also reject defendant's ineffective assistance of counsel claim based on this alleged error.

Next, we find no error in the trial court's instruction on reasonable doubt. The instruction, which was based on CJI2d 3.2, was sufficient to convey this concept to the jury. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000).

Lastly, defendant argues that the trial court erred when it instructed the jury on accomplice testimony by a disputed accomplice, CJI2d 5.5, rather than an undisputed accomplice, CJI2d 5.4. We conclude that defendant waived this issue by affirmatively expressing his approval of the instruction given. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

III

Defendant contends that he is entitled to a new trial because of the prosecutor's misconduct. Because defendant did not make an appropriate objection to the challenged remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Arguably, some of the prosecutor's opening statements fell outside the realm of non-argumentative factual discussion. However, they reflected the evidence presented at trial. Because jurors are presumed to follow their instructions, we find that the court's jury instructions, that they were to decide the case based upon the evidence presented at trial and that the attorney's statements were not evidence, were sufficient to cure any prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We further find that the remaining challenged remarks, considered in context, did not constitute plain error.[2] See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

IV

Defendant next argues that he was denied effective assistance of counsel at trial. We disagree. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because there was no *Ginther*[3]

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[2] Defendant contended that the prosecutor improperly appealed to the jury's sympathy and bolstered the testimony of prosecution witnesses during his closing argument and disparaged defendant and his defense during rebuttal.

[3] *Ginther*, *supra* at 443.

hearing, our review is limited to errors apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Defendant first claims that counsel failed to elicit the benefits received by certain prosecution witnesses in exchange for their testimony against defendant. However, the record belies defendant's assertion disclosing that counsel questioned each of the witnesses regarding their plea agreement with the prosecution. Although defendant complains that counsel did not explore the issue of possible penalties, the record indicates that it was the court that prohibited counsel from doing so.

Defendant also maintains that counsel failed to investigate and question a possible alibi witness. Yet, defense counsel stated at trial that both he and defendant had chosen to abandon the alibi defense after an unsuccessful attempt to diligently pursue that defense through the use of an investigator.

Defendant further argues, without elaboration, that counsel was ineffective for failing to timely and properly object to other matters discussed in this opinion. Defendant's cursory treatment of this issue is insufficient to properly present it for our review. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, in light of our disposition of the foregoing issues, we find no merit to this claim. Accordingly, defendant has not established that he was denied effective assistance of counsel.

V

Given our conclusions in the issues presented above, we find that defendant has not established that he was denied a fair trial due to the cumulative effect of errors. *Bahoda*, *supra* at 292 n 64.

VI

Finally, defendant maintains that he is entitled to a new trial because of newly discovered evidence.[4] We disagree. A new trial may be granted where the evidence (1) is newly discovered, (2) is not merely cumulative, (3) is such as to render a different result probable on retrial, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

After defendant was convicted, defendant's brother Patrick Roberts, who was a prosecution witness, wrote a letter admitting that defendant was not involved in the killing and that Roberts only stated otherwise because his family had been threatened. Roberts maintained that two friends of one of the other witnesses were actually involved in the killing.

The discovery that trial testimony was perjured may be grounds for a new trial based on newly discovered evidence, provided the evidence is truly newly discovered. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). "However, where newly discovered evidence

[4] Because defendant failed to preserve this issue below, we review this issue for plain error only. *Carines*, *supra* at 763.

takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992) (citations omitted). Given that several other witnesses identified defendant as being involved in the offense, it is not probable that the alleged newly discovered evidence would produce a different result on retrial. Thus, we conclude that a new trial is not warranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen M. Fort Hood